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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]203

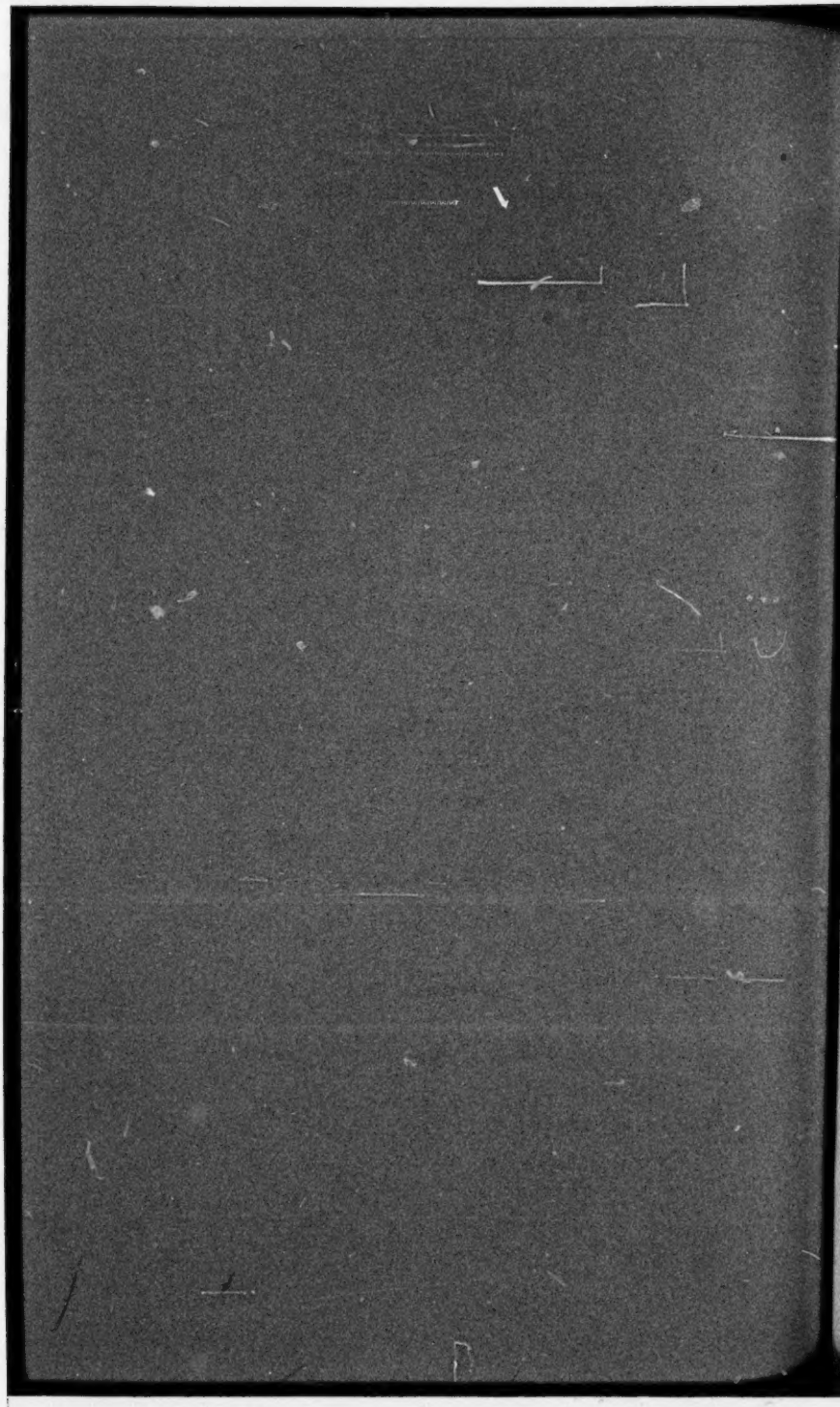
CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, FRANK THEIS, PAUL M. FOGEL AND NED J. FORTNEY, AS MEMBERS OF THE BOARD OF PARK COMMISSIONERS OF KANSAS CITY, MISSOURI, AND J. V. LEWIS, AS SUPERINTENDENT OF PARKS OF KANSAS CITY, MISSOURI, *Petitioners*,

vs.

ESTHER WILLIAMS, LENA R. SMITH AND JOSEPH N. MOORE, *Respondents*.

PETITION OF CITY OF KANSAS CITY, MISSOURI, ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DAVID M. PROCTOR,
City Counselor,
BENJ. M. POWERS,
Associate City Counselor,
JOHN J. CONNOYS,
Associate City Counselor,
Attorneys for Petitioners.



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CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, FRANK THEIS, PAUL M. FOGEL AND NED J. FORTNEY, AS MEMBERS OF THE BOARD OF PARK COMMISSIONERS OF KANSAS CITY, MISSOURI, AND J. V. LEWIS, AS SUPERINTENDENT OF PARKS OF KANSAS CITY, MISSOURI, *Petitioners*,

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ESTHER WILLIAMS, LENA R. SMITH AND JOSEPH N. MOORE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Kansas City, Missouri, a municipal corporation, and Frank Theis, Paul M. Fogel and Ned J. Fortney, as members of the Board of Park Commissioners of Kansas City, and J. V. Lewis, as Superintendent of Parks of Kansas City, pray that a writ of certiorari be issued to review the

judgment of the Court of Appeals, of the Eighth Circuit, entered on June 10, 1953, in the consolidated cases of—

No. 14,664.

City of Kansas City, Missouri, a Municipal Corporation, Frank Theis, Paul M. Fogel and Ned J. Fortney, As Members of the Board of Park Commissioners of Kansas City, Missouri, and J. V. Lewis, As Superintendent of Parks of Kansas City, Missouri, *Appellants*,

vs.

Esther Williams, Lena R. Smith and Joseph N. Moore, *Appellees*,

and

No. 14,666.

Esther Williams, Lena R. Smith and Joseph N. Moore, *Appellants*,

vs.

City of Kansas City, Missouri, a Municipal Corporation, Frank Theis, Paul M. Fogel and Ned J. Fortney, As Members of the Board of Park Commissioners of Kansas City, Missouri, and J. V. Lewis, As Superintendent of Parks of Kansas City, Missouri, *Appellees*.

OPINIONS BELOW.

The opinion of the District Court of the Western Division of the Western District of Missouri (R. 24) is reported in 104 F. Supp. 848. The opinion in the Court of Appeals (R. 93) is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 10, 1953. On June 26, 1953, the Court of Appeals stayed the issuance of its mandate for a period of thirty (30) days (R. 103). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED.

(1) Whether the Court of Appeals, in its decision, should have fully considered the swimming pool facilities afforded by Kansas City, Missouri, through its Board of Park Commissioners, to negroes and white persons respectively, and have found, as a matter of law, that the facilities afforded negroes were substantially equal to those furnished white persons.

(2) Whether swimming pool facilities furnished negroes, by the City of Kansas City, Missouri, through its Board of Park Commissioners, are substantially equal to the swimming pool facilities furnished white persons, so that negroes are not deprived of the rights granted by the Fourteenth Amendment to the Constitution of the United States, and by Section 41, Title 8, U. S. C. A.

(3) Whether the failure to furnish swimming pool facilities for negroes in Swope Park, such facilities having been furnished white persons, deprived plaintiffs (appellees) of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and as provided by Sections 41 and 43, of Title 8, of the U. S. C. A., even though substantially equal swimming pool facilities have been provided for negroes free of charge in a public park immediately adjacent to that section of Kansas City inhabited by the larger portion of the negro population.

STATUTES INVOLVED.

Sections 41 and 43, of Title 8, of the U. S. C. A.

PLEADINGS AND COURT'S OPINION.

The controversy had its origin in a suit instituted by three negroes against Kansas City and certain of its officials, alleging that they had been denied admission into the Swope Park Swimming Pool used exclusively by whites, and prayed for, among other things, a permanent injunction. In their petition, as amended, the plaintiffs pled (R. 6):

> "* * * and that defendants and each of them, their privies and successors in office be enjoined permanently from denying to plaintiffs and all other Negro citizens of Kansas City, Missouri, equal access to and enjoyment of the aforesaid recreational facilities *subject only to rules and regulations applicable to all without regard to race*" (Italics ours).

Thus, the plaintiffs prayed for a ruling that segregation in the use of the swimming pool was unconstitutional *per se*.

Your petitioners, in their amended joint answer (R. 13, Par. 12) pled:

> "Defendants further allege that since they have provided substantially equal outdoor swimming pool facilities for the members of the Caucasian and Negro Races, respectively, that segregation of the races in the use of said facilities is not in violation of the Fourteenth Amendment to the Constitution of the United States and that neither plaintiffs nor any member of the negro race has, as a consequence, been deprived of any right guaranteed by said amendment to the Constitution."

In their answer your petitioners relied on the uniform decisions of the Supreme Court of the United States ruling that separate public facilities if they are substantially equal are not violative of the Fourteenth Amendment.

The United States District Court for the Western Division of the Western District of Missouri, in its opinion, made findings of fact that the Parade Park Swimming Pool, as constructed and maintained by defendant, Kansas City, for use and enjoyment of negro citizens and resident taxpayers, is not substantially equal in character, location, appointment and facilities generally with major swimming pools constructed and maintained by said defendant, for use and enjoyment for white citizens and resident taxpayers of said City (R. 36).

And said District Court further adjudged and declared that the refusal of the defendant, the City of Kansas City, Missouri, acting through its Board of Park Commissioners and the Superintendent of Parks, to permit plaintiffs to use the Swope Park Swimming Pool solely because of race and color while granting this right to white persons, deprives the plaintiffs of the legal protection of the laws of the Fourteenth Amendment and Sections 41 and 43, Title 8, U. S. C. A., and rights and privileges secured thereunder (R. 46-47).

In its opinion, the Circuit Court of Appeals stated (U. S. C. A., p. 8) (R. 93):

> "These and the many other differences pointed out by the trial court, which we shall not undertake to repeat, *would make it impossible for us to say as a matter of law* that the *court's appraisal of the two pools* as not constituting substantially equal facilities for swimming enjoyment *was clearly erroneous*" (Italics ours).

Thus, the Court of Appeals did not rule that the facilities of the two pools, one for Whites and one for Negroes, were not substantially equal.

The Court of Appeals also stated in its opinion (U. S. C. A., p. 6) (R. 97):

> "The admittance of negroes to Swope Park, the same as whites, for enjoyment of it as a general recreation area or center, in accordance with the object for which it was maintained, but with a denial to the negro of the privilege of engaging in diving, swimming, wading and sun-bathing activity, as one of the incidents of the comprehensive recreational program afforded by the Park to others on an outing occasion, would constitute in our opinion *unequal treatment and illegal discrimination against the negro* in his right to enjoy Swope Park for what it had been made to become" (Italics ours).

According to the court's opinion the "unequal treatment and illegal discrimination" was not based on a comparison of two pools—Swope Park and Parade Park, which was the issue, but upon the City refusing the plaintiffs admission to the Swope Park Pool in a public park where they were permitted to use other recreational facilities. This ruling was foreign to the issues involved.

STATEMENT OF FACTS.

The evidence adduced at the trial developed the following facts, as to which there was no dispute.

Plaintiffs are citizens and taxpayers of Kansas City and members of the negro race. The individual defendants are members of the Board of Park Commissioners and Superintendent of Parks of Kansas City, Missouri, and were acting in their official capacities in respect to the

alleged violation of constitutional rights charged by plaintiffs. The City, through said Board, maintains and operates three outdoor swimming pools, one in Swope Park (for whites exclusively) built in 1942 (R. 65), one in Parade Park, in the vicinity of 17th and Paseo Boulevard (for negroes exclusively), built in 1939 (R. 69), and for three and one-half years thereafter operated as the only major swimming pool of the City with modern equipment and standard features; and one in Grove Park, near 15th and Benton (for whites exclusively), built about forty years ago.

The City also maintains and operates a junior swimming pool for negroes, consisting of a wading pool for small children and a swimming pool for inexperienced swimmers, built in 1950, and in Nelson C. Crews Park, in the vicinity of 27th and Woodland Avenue, about ten blocks south of Parade Park, and three other junior swimming pools for whites (R. 70). All four junior pools are of the same size and equipment, built in recent years according to identical plans, in attractive park and playground areas. The Penn Valley pool, in the vicinity of 25th and Summit Streets, built as an outdoor swimming pool and reserved exclusively for white persons, was demolished in 1949 to clear a right-of-way for traffic, and has not been replaced.

Character of Facilities.

The water used in the Swope Park Swimming Pool and the Parade Park Pool is taken from the same source and is the same as that used for drinking purposes throughout the City (R. 69). The water is treated with chlorine, alum and other chemicals and then purified through filtration and circulated under pressure in the pools (R. 69). Life guards with senior Red Cross life guard qualifications, are constantly maintained at both pools, the number vary-

ing with the number of patrons, but always sufficient to provide adequate life guard service (R. 69). There was a total of twenty-two attendants employed at the Parade Park Pool at the time suit was instituted. At both pools a system of checking valuables, at a cost of ten cents, is maintained, and the same system for checking wearing apparel of the patrons is employed. Both pools have separate toilets for men and women and the said facilities are substantially equal (R. 70). Both pools and the buildings in connection therewith are cleaned with the same quality of materials and in the same manner with chemically treated water according to the standards set up by the American Public Health Association (R. 70); at both pools the water, buildings, and toilet facilities, are kept at a high level of cleanliness and sanitary condition (R. 70). Separate dressing rooms for men and women, substantially equal in character, are furnished at both pools. The Parade Park Pool for negroes' dressing room and toilet facilities are housed in an attractive structure of stone and stucco with the central lobby faced with tile (R. 69). Both pools are substantially equal in their setting in that they are surrounded by blue grass turf, shade trees and shrubs. The Parade Park Pool is in the Parade Park which extends northward to 15th and Paseo, and is bordered on the west by The Paseo, a boulevard with a double roadway separated by wide parking of blue grass, trees and shrubs. The normal swimming season for both pools is from June 15th to and including Labor Day (R. 70).

Size of Pools.

The Swope Park Pool has an area of 20,125 square feet and the Parade Park Pool an area of 4,725 square feet (R. 78). The area of the Parade Park Pool is approximately sixteen per cent of the total area of the three major

pools and 23.5 per cent of the swimming area of the Swope Park Pool alone. The Swope Park Pool is divided by concrete partitions, into three sections, a shallow one for children and non-swimmers, a deep one for divers, and the other, by far the largest of the three, for swimmers generally (R. 73). In the Parade Park Pool there are no partitions dividing the pool into compartments, but the portion used by divers is roped off from the portion used exclusively by swimmers. The Swope Park Pool is provided with a sunning beach and automatic hair dryers, but these features are not furnished at the Parade Park Pool (R. 73).

Use of Pools.

The population of Kansas City on January 1, 1950, was 456,622, of which 55,682 were negroes (R. 76, 78); the negro population is approximately one-eighth, or 12.172, of the total population. The negro population in the last decade increased thirty-four per cent. Thus, for the colored population, constituting approximately one-eighth of the whole, one-sixth of the total major swimming pool area is provided. During the swimming season of 1951, there was a registered attendance of 94,460 at the Swope Park Pool, or a number equal to about twenty-three per cent of the total white population; there was a registered attendance of 59,470 at the Parade Park Pool (R. 76), or a number equal to about one hundred and six per cent of the total negro population. There were 11,795 admissions to the Nelson C. Crews junior pool (for negroes) registered in 1951, or a number equal to twenty per cent of the total negro population (R. 76). The Parade Park Pool and the Nelson C. Crews Pool, both for the exclusive use of negroes, are near the center of a large residential district occupied almost exclusively by negroes, who are served in

this district by a YMCA, a YWCA, a high school, grade schools and churches used exclusively by negroes. Both pools are located in parks with attractive surroundings as shown by photographs in evidence (Exhibits B to T, inclusive, R. 62).

Charges at the Pools.

At the Swope Park Pool a fee of forty cents is charged adults and twenty cents for children under twelve, with free admission for small children before noon on certain days of the week. At the Parade Park Pool the admission is free for all patrons, adults and children. Neither negroes nor whites are taxed for the operation, maintenance and repairs of the Swope Park Pool. Since its completion, it has produced revenue supplied by admission fees, totaling $53,515.23 to September 1, 1951, in excess of the total cost of operation, maintenance and repairs (R. 82-83). The cost of operating the Parade Park Pool in 1951 was $14,197.48, derived entirely from taxes (R. 81). Its total cost to the taxpayers for five years from 1947 to 1951 was $53,881.75 (R. 77). On hot days the pool in Parade Park is frequently more overcrowded than the pool at Swope Park, as 250 swimmers, with 2-hour shifts, is the largest number that can be accommodated at one time at the Parade Park Pool, which is open for the public from 10:00 a. m., to 10:00 p. m., except on Sundays when it is open to the public from 8:00 a. m., to 10:00 p. m. (R. 73). The occasional overcrowded condition at Parade Park Pool is due in part to the fact that no admission fee is charged, resulting, under the regulations employed, in many patrons using the pool more than once on a single day (R. 73); said condition is also attributable, in part, to the use of the Parade Park Pool facilities by persons living outside of Kansas City (R. 73). Patrons of

the Swope Park Pool, particularly on holidays and Sundays, in extremely hot weather, are at times compelled to stand in line awaiting their turn for admission (R. 74).

Junior Swimming Pools.

The junior swimming pool for negroes, maintained in the Nelson C. Crews Park, has an area of 1,357 square feet, or 25 percent of the total area of the four junior swimmining pools; all four of the junior swimming pools are maintained in substantially the same condition as to cleanliness and health, with no admission fees charged (R. 76).

SPECIFICATION OF ASSIGNED ERRORS.

I.

The Court of Appeals erred in relying upon McLaurin vs. Oklahoma State Regents for Higher Education as authority for affirming the judgment and decree of the District Court.

II.

The Court of Appeals erred in failing to make a full and detailed comparison between the Swope Park Swimming Pool Facilities reserved for whites exclusively and the Parade Park Swimming Pool Facilities reserved for negroes exclusively.

III.

The Court of Appeals erred in failing to reverse the judgment and decree of the District Court and in not holding that the undisputed facts, as a matter of law, showed that the swimming pool facilities furnished negroes were substantially equal to those furnished white persons.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

I.

The Application of the Fourteenth Amendment to Segregation in the Use of Swimming Pools Has Never Been Determined by This Court.

We find no record of a decision of the Supreme Court of the United States interpreting the scope of the Fourteenth Amendment in its application to segregation in the use of swimming pools. The close association of half-naked persons in swimming pools when complicated by racial differences sometimes leads to a smoldering resentment of explosive character. Presently, there are many cities in the United States whose combined population involves several million citizens, confronted with the problem of segregated use of public swimming pools; consequently, the issues involved in this case are of great public interest, national importance and unique character.

II.

The Court of Appeals Erred in Relying on McLaurin vs. Oklahoma As Authority for Affirming the Judgment and Decree of the District Court.

The Court of Appeals relies on the case of *McLaurin* v. *Oklahoma State Regents for Higher Education et al.*, 339 U. S. 637, and draws an analogy between that case and the case at bar. We respectfully submit that there is no analogy. In the McLaurin case, there was no other graduate school for negroes. In Kansas City there was another first-grade swimming pool for negroes substantially equal to the Swope Park Pool in all features essential for the privilege and pleasure of swimming. If there had been no

other major swimming pool for negroes in Kansas City and if the plaintiffs had been admitted to the Swope Park Pool but denied certain privileges therein enjoyed by white persons, then the McLaurin case might apply, but plaintiffs were not admitted to the Swope Park Pool at all. The McLaurin case is no authority for the decision of the Court of Appeals in the case at bar.

III.

The Court of Appeals Erred in Failing to Make a Full and Detailed Comparison Between the Swope Park Swimming Pool Facilities Reserved for Whites Exclusively and the Parade Park Swimming Pool Facilities Reserved for Negroes Exclusively.

The Court of Appeals based its opinion on the single fact that the plaintiffs were not admitted to the Swope Park Pool although admitted to Swope Park and to the use of other recreational facilities therein. The Court of Appeals ignored and disregarded a comparison of the facilities of the two pools and failed to consider all of the factors which must be considered in determining the question of substantial equality of facilities. The record contained a full, detailed and undisputed statement of the physical facilities, including such vital elements as accessibility to prospective patrons using the facilities and the important element of entrance fees. The result is that there has been no determination in this case of the most vital and significant question involved.

IV.

The Court of Appeals Erred in Classifying Public Recreational Facilities Such As Golf, Picnic Ovens, Boating on a Lagoon and Starlight Theatre, in the Same Category with a Public Swimming Pool Facility.

There is a distinct line of demarcation in the interracial implications and reactions involved between a swimming pool and a Starlight Theatre. The innate desire of women for physical privacy based on difference of sex, is a real and not a mythical barrier; sex consciousness does not arise from the intermingling of persons, irrespective of race or color, when they are fully clothed on a golf course or in a theatre. To illustrate, if at both the Swope Park Pool and the Parade Park Pool, the Board of Park Commissioners, in the interest of economy, or for other reasons, should close the rest rooms for men and permit them to use the rest rooms provided for women, the latter would not use the rest rooms, nor the pools respectively, not on account of color or race, but because of an inborn desire for physical privacy. Only in a lesser degree do most women, with scant swimming attire, have an aversion to intermingling in a swimming pool with male strangers of another race, and we respectfully submit that no mandate or decree of Court will obliterate this trait of human nature.

V.

The Court of Appeals Erred in Failing to Reverse the Judgment and Decree of the District Court and in Not Holding That the Facts, As a Matter of Law, Showed That the Swimming Pool Facilities Furnished Negroes Were Substantially Equal to Those Furnished White Persons.

There is no issue of fact in this case. None of the evidence as to the character of the swimming facilities is disputed. The trial court's finding of fact that the Parade Park Pool for negroes is not substantially equal in character, location, appointments, and features, to the major pool constructed and maintained for use and enjoyment of white citizens and resident taxpayers of Kansas City, therefore, becomes a question of law.

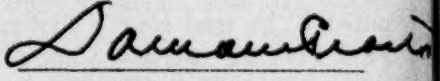
Therefore, the ruling of the Circuit Court of Appeals that the City was guilty of "unequal treatment and illegal discrimination against the negro" to enjoy the Swope Park Swimming Pool involves a question of law only, which the court did not decide. It was the function and duty of the Court of Appeals to hold, as a matter of law, that the facilities furnished negroes either were or were not substantially equal to the facilities furnished white persons at the Swope Park Swimming Pool. If the Parade Park Pool furnished for the exclusive use of negroes was substantially (not identically) equal to the facilities furnished the whites at the Swope Park Swimming Pool, it was the function and duty of the Court of Appeals to so find and in that event the segregation employed by the City was lawful and in accordance with the rules of the Supreme Court of the United States in all segregation cases.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

In the event the court should grant the writ of certiorari, petitioners request the court to enter an order staying the enforcement of the judgment below.

Respectfully submitted,



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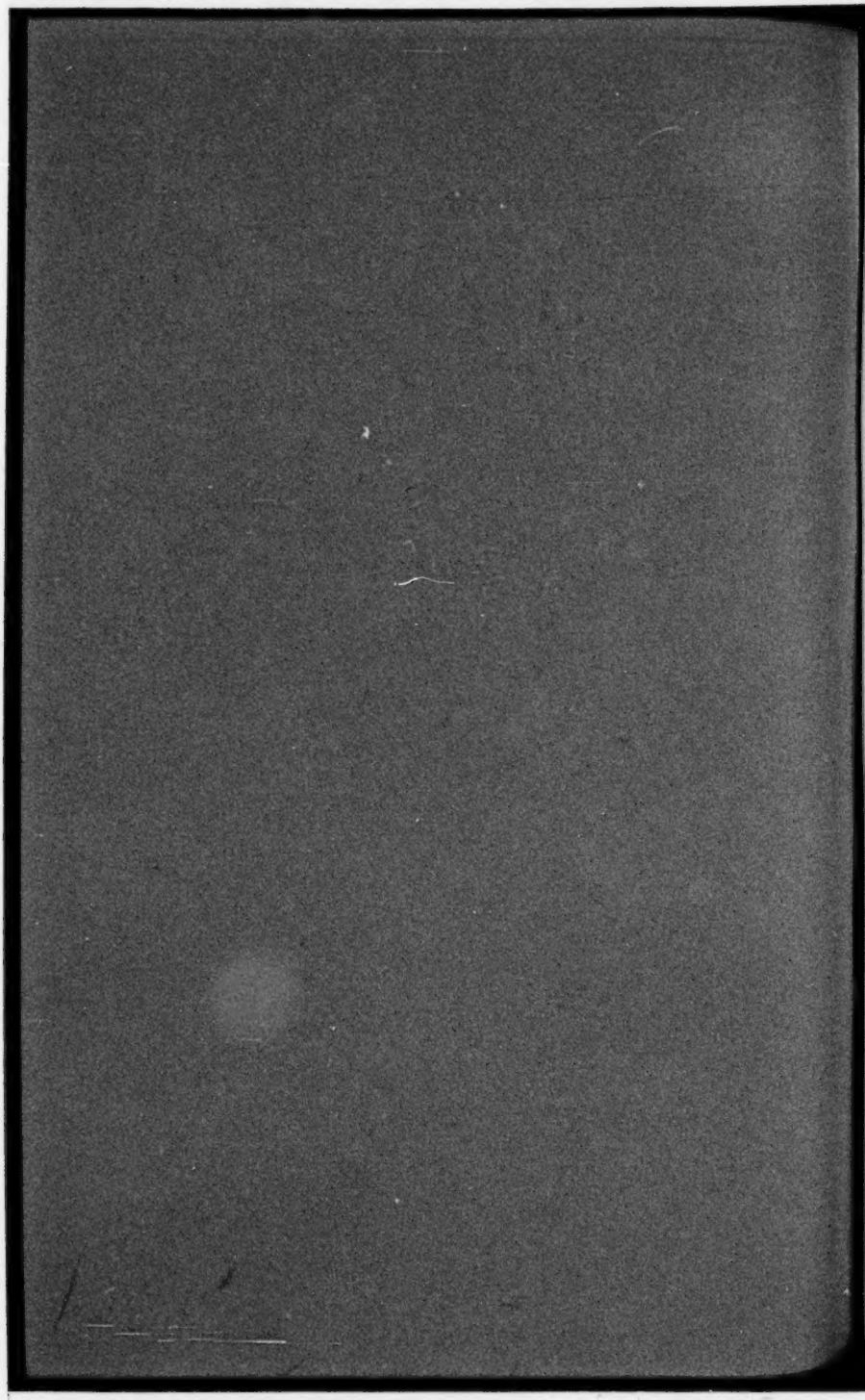

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The judgment of the Court of Appeals was entered on June 10, 1953. On June 26, 1953, the Court of Appeals stayed the issuance of its mandate for a period of thirty (30) days (R. 103). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

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Thus, the plaintiffs prayed for a ruling that segregation in the use of the swimming pool was unconstitutional *per se*.

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And said District Court further adjudged and declared that the refusal of the defendant, the City of Kansas City, Missouri, acting through its Board of Park Commissioners and the Superintendent of Parks, to permit plaintiffs to use the Swope Park Swimming Pool solely because of race and color while granting this right to white persons, deprives the plaintiffs of the legal protection of the laws of the Fourteenth Amendment and Sections 41 and 43, Title 8, U. S. C. A., and rights and privileges secured thereunder (R. 46-47).

In its opinion, the Circuit Court of Appeals stated (U. S. C. A., p. 8) (R. 93):

> "These and the many other differences pointed out by the trial court, which we shall not undertake to repeat, *would make it impossible for us to say as a matter of law that the court's appraisal of the two pools* as not constituting substantially equal facilities for swimming enjoyment *was clearly erroneous*" (Italics ours).

Thus, the Court of Appeals did not rule that the facilities of the two pools, one for Whites and one for Negroes, were not substantially equal.

The Court of Appeals also stated in its opinion (U. S. C. A., p. 6) (R. 97):

"The admittance of negroes to Swope Park, the same as whites, for enjoyment of it as a general recreation area or center, in accordance with the object for which it was maintained, but with a denial to the negro of the privilege of engaging in diving, swimming, wading and sun-bathing activity, as one of the incidents of the comprehensive recreational program afforded by the Park to others on an outing occasion, would constitute in our opinion *unequal treatment and illegal discrimination against the negro* in his right to enjoy Swope Park for what it had been made to become" (Italics ours).

According to the court's opinion the "unequal treatment and illegal discrimination" was not based on a comparison of the two pools—Swope Park and Parade Park, which was the only issue, but upon the City refusing the plaintiffs admission to the Swope Park Pool in a public park where they were permitted to use other recreational facilities. This ruling was foreign to the issues involved.

SPECIFICATION OF ASSIGNED ERRORS.

I.

The Court of Appeals Erred in Relying upon McLaurin vs. Oklahoma State Regents for Higher Education As Authority for Affirming the Judgment and Decree of the District Court.

McLaurin v. *Oklahoma State Regents for Higher Education et al.*, 339 U. S. 637.

II.

The Court of Appeals Erred in Failing to Make a Full and Detailed Comparison Between the Swope Park Swimming Pool Facilities Reserved for Whites Exclusively and the Parade Park Swimming Pool Facilities Reserved for Negroes Exclusively.

Plessy v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138.

Gong Lum v. *Rice*, 275 U. S. 78, 48 S. Ct. 91.

Gaines v. *Canada*, 305 U. S. 337, 59 S. Ct. 232.

Fisher v. *Hurst*, 333 U. S. 147, 68 S. Ct. 389.

Boyer v. *Garret*, 183 F. 2d 582.

Chilton v. *St. Louis & I. M. R. R. Co.*, 114 Mo. l. c. 91, 21 S. W. 457.

Younger v. *Judah*, 19 S. W. 1109, 111 Mo. 303.

III.

The Court of Appeals Erred in Failing to Reverse the Judgment and Decree of the District Court and in Not Holding That the Undisputed Facts, As a Matter of Law, Showed That the Swimming Pool Facilities Furnished Negroes Were Substantially Equal to Those Furnished White Persons.

Bogardus v. *Commissioner of Internal Revenue*, 302 U. S. 34.

Weicker v. *Bromfield*, 34 F. 2d 377.

H. B. Glover v. *Bladine, Collector*, 34 F. 2d 605, l. c. 607.

Western Battery and Supply Co. v. *Hazelett Storage Battery Co.*, 61 F. 2d 220, l. c. 221.

Union Wire Rope Corporation v. *A., T. & S. F.*, 66 F. 2d 965.

Exmoor Country Club v. *United States*, 119 F. 2d 961.

Cycl. of Federal Procedure, Vol. 7, Section 3336, page 552.

Chilton v. *The St. Louis and I. M. Railway Company*, 114 Mo. l. c. 91, 21 S. W. 457.

ARGUMENT.

I.

The Court of Appeals Erred in Relying upon McLaurin vs. Oklahoma State Regents for Higher Education As Authority for Affirming the Judgment and Decree of the District Court.

In deciding the main issue in this case, the Court of Appeals cited and appeared to rely by analogy upon one case—*McLaurin* v. *Oklahoma State Regents for Higher Education et al.*, 339 U. S. 637, and frankly stated:

> "We shall not engage in a detailed comparison of the negro pool, located some 4½ miles away from Swope Park with the Park Pool, as mere physical facilities."

Ignoring this vital point around which the whole case had turned, the Court of Appeals drew an analogy between the case at bar and the McLaurin case when there was no legitimate analogy between the two situations.

In the McLaurin case, the plaintiff, McLaurin, had been admitted to the graduate school of the University of Oklahoma but had been restricted in such ways that this court found that he was not able to receive the benefits of such admission as did white students. There were no graduate school facilities afforded by the State of Oklahoma for negroes and, hence, McLaurin was not able to receive the benefits afforded white students for higher education and the Court expressed that opinion in the following words:

> "The result is that appellant is handicapped in his pursuance of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to

> engage in discussions and exchange of views with other students, and in general to learn his profession. * * * Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is equal to that of his classmates" (l. c. 641).

Arguing from this situation, the Court of Appeals contended that the plaintiffs here had been admitted to Swope Park generally and were able to enjoy all of its recreational facilities except the swimming pool; hence, in effect, the plaintiffs had not been able to make full use of the Swope Park facilities of which the swimming pool was only one. Thus, the issue was changed from the question of whether plaintiffs had been afforded substantially equal swimming pool facilities to a different issue, to-wit, whether they had been afforded full use of Swope Park, and so the Court said that the admittance of negroes to Swope Park, but with the denial to negroes of the "privilege of diving, swimming, wading and sun-bathing activities, would constitute unequal treatment and illegal discrimination against the negro and his right to enjoy Swope Park for what it had been made to become."

In other words, the Court took the position that the use of Swope Park by negroes is spoiled because they cannot swim there.

But Kansas City does furnish swimming facilities to negroes elsewhere in the City and the swimming facilities furnished negroes are substantially equal to those furnished white persons in Swope Park. This difference in the case at bar nullifies the McLaurin case as an authority determinative of the issues in this case.

In stressing the McLaurin case as an authority, the Court of Appeals indulged in the assumption not sup-

ported by the record that negro swimmers went to Swope Park to indulge in all of the recreational facilities on the same trip, and in order to swim would have to disrupt their visit and drive 4½ to 6 miles to the swimming facilities (Parade Park pool) and then return to Swope Park to resume their enjoyment of other recreational facilities. This is based on surmise and speculation. Certainly the plaintiffs did not take the position, that their enjoyment of Swope Park had been destroyed because they could not swim there and they went directly to Swope Park for the purpose of swimming and nothing else. The evidence does not disclose that negroes, or white persons either for that matter, expected to enjoy all of the recreational facilities in Swope Park on the same trip. Swimming is such a distinct type of recreation that it cannot be coupled with all other types of recreation as an essential part of park enjoyment. Segregation of races in the use of public pools produces no such harmful effects as are described by the Court in the McLaurin case.

Thus, the Court of Appeals decided this case on issues that were not raised and on a record that did not exist but on an unsupported surmise.

II.

The Court of Appeals Erred in Failing to Make a Full and Detailed Comparison Between the Swope Park Swimming Pool Facilities Reserved for Whites Exclusively and the Parade Park Swimming Pool Facilities Reserved for Negroes Exclusively.

The Court of Appeals, frankly ignored and disregarded a comparison between the swimming facilities of the Swope Park pool and those of the Parade Park pool. The Court bases its opinion on the single fact that plaintiffs were not admitted to Swope Park although in the

same park they were admitted to equal enjoyment with whites of other recreational facilities. The Court brushed aside this determinative issue with the words:

> "We shall not engage in a detailed comparision of the negro pool, located some 4½ miles away from Swope Park with the Park Pool, as mere physical facilities."

But the issue in the case did require a detailed comparison of these physical facilities. We take it that if the Parade Park Pool (aside from location) had been an exact duplication of the Swope Park Pool, the ruling would have been the same.

We find no justification for this in any case involving segregation of races, decided by the Supreme Court of the United States. Neither brick nor mortar, nor the location of separate facilities for the two races are the sole factors in determining the question of substantial equality of swimming pool facilities. Many factors must be considered. Accessibility to the prospective patrons of a facility constitutes an important element in determining substantial equality. Edward J. Kelly, called by plaintiffs, Superintendent of National Capitol Parks, whose responsibility is the operation, maintenance and management of the National Park System of the District of Columbia, testified that the more accessible recreational facilities are, the more desirable it is; that swimmers go to the facilities that are closest to their homes (R. 66).

Admission fees, likewise, have an important bearing in determining whether the separate facilities provided the two races are substantially equal. The Board of Park Commissioners, recognizing that negroes as a race are in a lower income bracket than the white race, operate the Parade Park Pool without charges for admission. As a re-

sult, the Parade Park Pool located very near the center of the negro residential district, some twenty blocks blocks square, occupied by an overwhelming majority of all the negroes of Kansas City, Missouri, with the added privilege of free admission, has afforded the negroes, including the plaintiffs, unusual opportunity for enjoying the privileges and benefits of a major swimming pool containing all of the essential features for enjoyment of swimming.

If there had been no Parade Park Pool, and one major swimming pool for negroes had been located in Swope Park, some six and one-half miles removed from the negro population, and a charge of forty cents for all patrons above twelve years of age and twenty cents for those below twelve, desiring to swim, there would have been "unequal treatment and illegal discrimination against the negro" and the "unequal treatmemnt and illegal discrimination" could and would have been chargeable to the inaccessibility, distance and remoteness of the pool from the negro population it intended to serve. The City could also have been justly charged with "unequal treatment and illegal discrimination against the negro" in failing to recognize that negroes as a race are in a lower income bracket than the white race. In providing swimming pool facilities for negroes, the City considered well the elements of accessibility and charges for admission. It based its decisions on practical realities and not on technical consideration of asserted constitutional rights.

Swope Park, located near the southeast corner of the City, whose boundaries, forming a rectangle, are about five miles wide and fifteen miles long, does not draw a heavy attendance from whites, because of its distance and remoteness to large segments of the white population and also the charges imposed. The importance of the factors

of accessibility and charges for admission, wholly disregarded by the Court of Appeals, is clearly demonstrated by the attendance records of the two major pools. The attendance at the Parade Park Pool in 1951 was 59,478, and the total negro population was 55,682. The attendance, therefore, at the pool was one hundred and six per cent of that total negro population. This does not include admissions of 11,795 to the Nelson C. Crews Junior Pool (for negroes) or a number equal to twenty per cent of the total negro population. The grand total of admissions to the two facilities (both negroes) for 1951 was 71,265. This record, we submit, is unanswerable proof that the swimming pool facilities provided for negroes are popular, and furnish all negroes, both adults and children, the opportunity and privilege of enjoying swimming pool privileges.

The negro pools serve the negroes of Kansas City, Missouri, better and more fairly than if one large pool had been located in Swope Park for their use.

The attendance, however, at the Swope Park Pool in 1951 was only 94,460, or a number equal to about twenty-three per cent of the total white population. In proportion to population, the negro swimming pool facilities attracted four times as many patrons as the Swope Park Pool for whites.

Your petitioners were entitled to have all of these elements considered because substantial equality was the main issue of the case and the record demonstrates that considering the number of prospective patrons negroes were afforded substantially equal swimming facilities. This being so, the rulings of this court from the Plessy case to the present required a reversal of the decision of the District Court. *Plessy* v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138; *Gong Lum* v. *Rice*, 275 U. S. 78, 48 S. Ct. 91; *Gaines* v. *Canada*, 305 U. S. 337, 59 S. Ct. 232; *Fisher* v. *Hurst*, 333

U. S. 147, 68 S. Ct. 389; *Boyer* v. *Garret*, 183 F. 2d 582; *Chilton* v. *St. Louis & I. M. R. R. Co.*, 114 Mo. l. c. 91, 21 S. W. 457, and *Younger* v. *Judah*, 19 S. W. 1109, 111 Mo. 303.

In certain trivial details the Parade Park Pool lacked a few features provided at the Swope Park Pool. These features are of no particular value to a swimming pool, operated primarily for the enjoyment of swimming. There is no proof that they are needed or necessary or for swimming enjoyment. There was no proof that they are vital to the enjoyment of swimming in the pool or even used, by many, if any, of its patrons. There was no evidence offered to show that they constitute standard equipment for a swimming pool. It would be more accurate to classify them as added accessories or frills producing no privileges and pleasures of swimming that are not enjoyed by the patrons of the Parade Park Pool.

Neither pool was built as a sort of emporium for diversified activities, including a commissary and hair drying equipment. They were built for serving the public in the matter of swimming in pools that were chemically clean, guarded for safety, and in attractive settings of trees, shrubs, flowers and blue grass turf.

When the whole picture is reviewed we submit that the Court of Appeals erred in not holding, as a matter of law, that the facilities provided for negroes were substantially equal in compliance with the law. The advantages of accessibility and freedom from the payment of fees gives to the negroes of Kansas City substantial advantages not enjoyed by white persons desiring to swim.

III.

The Court of Appeals Erred in Failing to Reverse the Judgment and Decree of the District Court and in Not Holding That the Undisputed Facts, As a Matter of Law, Showed That the Swimming Pool Facilities Furnished Negroes Were Substantially Equal to Those Furnished White Persons.

There is no issue of fact in this case. None of the evidence as to the character of the swimming facilities is disputed.

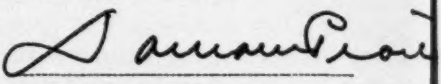
Therefore, the ruling of the Circuit Court of Appeals that the City was guilty of "unequal treatment and illegal discrimination against the negro" to enjoy the Swope Park Swimming Pool involves a question of law only, which the court did not decide. With no facts in dispute it was the function and duty of the Court of Appeals to hold, as a matter of law, that the facilities furnished negroes either were or were not substantially equal to the facilities furnished white persons at the Swope Park Swimming Pool. If the Parade Park Pool furnished for the exclusive use of negroes was substantially (not identically) equal to the facilities furnished the whites at the Swope Park Swimming Pool, it was the function and duty of the Court of Appeals to so find and in that event the segregation employed by the City was lawful and in accordance with the rules of the Supreme Court of the United States in all segregation cases. *Bogardus* v. *Commissioner of Internal Revenue,* 302 U. S. 34; *Weicker* v. *Bromfield,* 34 F. 2d 377; *H. B. Glover* v. *Bladine, Collector,* 34 F. 2d 605, l. c. 607; *Western Battery and Supply Co.* v. *Hazelett Storage Battery Company,* 61 F. 2d 220, l. c. 221; *Union Wire Rope Corporation* v. *A., T. & S. F.,* 66 F. 2d 965; *Exmoor Country Club* v. *United States,* 119 F. 2d 961; Cycl. of Federal Pro-

cedure, Vol. 7, Section 3336, page 552; *Chilton* v. *The St. Louis and I. M. Railway Company*, 114 Mo. l. c. 91, 21 S. W. 457.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,



DAVID M. PROCTOR,
City Counselor,
BENJ. M. POWERS,
Associate City Counselor,
JOHN J. COSGROVE,
Associate City Counselor,
Attorneys for Petitioners.

Office - Supreme Court, U.S.
FILED
AUG 22 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 203

CITY OF KANSAS CITY, MISSOURI, A Municipal Corporation, *et al.*,

Petitioners,

v.

ESTHER WILLIAMS, *et al.*,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT L. CARTER,
CARL R. JOHNSON,
THURGOOD MARSHALL,
Attorneys for Respondents.

DAVID E. PINSKY,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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Opinions Below

The opinion of the District Court (R. 24-44) is reported at 104 F. Supp. 848. The opinion of the Court of Appeals (R. 92-101) is not yet officially reported — F. 2d —.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the Fourteenth Amendment requires that petitioners admit respondents and all other Negroes similarly

situated to the use of the public wading, swimming and diving facilities afforded at Swope Park subject only to the same rules and regulations applicable alike to all other persons?

Statement

Respondents began this action in the district court seeking to enjoin petitioners from refusing to admit them to the wading, swimming and diving facilities at Swope Park solely because of their race and color. A trial on the merits took place on February 15, 1952 (R. 61 et seq.), and on April 18, 1952, the district court entered a memorandum opinion, including findings of fact and conclusions of law (R. 24-44) 104 F. Supp. 848. On May 7, 1952, a final decree was entered in respondents' favor restraining petitioners from refusing to admit them to Swope Park Pool and "all facilities operated in connection therewith because of their race and color" (R. 46-47). The Court of Appeals affirmed the judgment of the district court (R. 92-101). Petitioners now seek review of that judgment on certiorari in this Court.

ARGUMENT

I.

Petitioners have made no showing that the trial court was in error in concluding that respondents were not afforded equal facilities for swimming enjoyment.

The issue as raised and presented in the present posture of this case is too well settled to warrant review by this Court on certiorari. The decision of the court below that petitioners have denied respondents substantial equality with respect to public recreational facilities, as required by

the Fourteenth Amendment, is amply supported by the record adduced at the trial of this cause (R. 33-35, 75).

None of these evidentiary facts which are set forth in the memorandum opinion of the trial court (R. 25, 26, 27, 30, 34) are in dispute. Thus, petitioners do not purport to seek review of the evidentiary bases on which the judgment in this case rests. Petitioners merely state in effect that while the trial court has the correct facts, its conclusions are in error.

The undisputed evidentiary facts may be summarized as follows: Swope Park is the main outdoor recreational center of Kansas City. It is composed of some 1800 acres, contains a bathhouse, swimming pool, two golf courses, zoo, a theatre, band pavilion, picnic shelter and facilities. All of these facilities, except the swimming pool, are open to Negroes and white persons alike. The swimming pool, restricted to white persons, was constructed at a cost of $534,544.40. It is divided into three separate parts—swimming pool, diving pool and wading pool. Three thousand persons may be accommodated at the same time, and there is no time limit on the individual's use of the pool during the hours when it is open to the public. A refreshment concession is operated in connection with the pool; there is a sun beach, automatic dryers, and a separate bath house. A fee for admission is charged.

The Parade Park Pool cost $60,000, and there are no separate facilities for diving, swimming and wading, no automatic dryers, no sun beach, no refreshment concession, and no admission charge. It can only accommodate 250 people at a time, and its size is such that a time limit has to be set on each person's use of the pool.

On the basis of these facts, the trial court concluded that the Parade Park Pool did not afford respondents facilities for enjoyment of swimming equal to those avail-

able at the Swope Park Pool. The facts would seem to warrant that conclusion. Petitioners attempt to modify these differences by emphasizing such factors as the accessibility of Parade Park Pool to those residential areas where the Negro population is concentrated and the high percentage of Negroes using Parade Park Pool as compared with the low percentage of white population attracted to Swope Park Pool. This, however, is patently beside the point. The rights which respondents asserted are individual, *Sweatt* v. *Painter*, 339 U. S. 629. What must be determined is whether the individual, not the group, is afforded equal protection. Thus, those factors involving group advantages or disadvantages cannot be determinative of the issues in this case. The court below was required to disregard such factors in order to conform to the rulings of this Court, and quite properly refused to take such irrelevant and extraneous matters into account in deciding this case.

II.

Respondents have been denied equal treatment.

The Court of Appeals found that respondents, in being denied use of the Swope Park Pool, were denied equal treatment in the use and enjoyment of Swope Park Pool for the purposes for which it was designed—a center for recreational activities. The appellate court took a broader view of the question than did the trial court. It found that the public was encouraged to make use of Swope Park as a comprehensive outlet for recreation. One could picnic, lounge, play golf, go to theatre, visit a zoo, and Negroes were admitted to the Park to enjoy these facilities. However, the swimming pool which was a part of the comprehensive recreational program offered at the Park was off limits for Negroes. The court, viewing Swope Park in terms of the function it was designed to perform, concluded

that Negroes having been admitted to the Park were denied equal treatment in not being permitted to use all of its facilities on the same basis as all other persons. White people could go to Swope Park and indulge in its variety of recreational offerings, including use of the swimming pool. Negroes, on the other hand, could go to the park and indulge in all of its offerings except the swimming pool. Those desiring to swim had to leave Swope Park and go to Parade Park Pool on the other side of town. Without regard to a comparison of the two pools, on the basis of physical facilities alone, the court quite properly concluded that Negroes were not being accorded equal treatment with respect to the use and enjoyment for which Swope Park was designed. This, we think, is sound and accords with the rationale of this Court in *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

Petitioners make no effort to attack this reasoning but take out of context the court's statement that viewing the case in this manner it was not necessary to make a detailed comparison between the Parade Park Pool, some 4½ to 6½ miles away with the Swope Park Pool on the basis of mere physical facilities. The court was merely indicating that the judgment of the trial court, enjoining petitioners from refusing to admit respondents to the Swope Park Pool on the basis of their race and color, could be sustained without regard to the superiority of the Swope Park Pool with respect to physical facilities. The Court of Appeals, however, did not stop there. It went on to point to physical differences between the two pools and concluded that such differences made it impossible for it to conclude that the trial court was in error in deciding that respondents could not enjoy equal facilities for swimming at the Parade Park Pool. In short, the court's opinion indicates that judgment for respondents could be rendered without a comparison of physical facilities, under the rationale it adopted which it preferred as a sounder approach to decision in

this case. However, if physical differences alone were regarded as proper basis for decision, its opinion clearly shows that it finds ample justification for judgment for respondents on that ground.

CONCLUSION

It is respectfully submitted that no basis for review of this judgment exists and the petition for certiorari should be denied.

ROBERT L. CARTER,
CARL R. JOHNSON,
THURGOOD MARSHALL,
Attorneys for Respondents.

DAVID E. PINSKY,
of Counsel.

Dated: August 21, 1953.